PUBLICATION

Ninth Circuit: Coast Guard's Letter of Recommendation Regarding Proposed LNG Facility Not Subject to Judicial Review

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The U.S. Court of Appeals for the Ninth Circuit recently issued an opinion dismissing for lack of jurisdiction a petition for review brought by various environmental groups of the U.S. Coast Guard's issuance a letter of recommendation to the Federal Energy Regulatory Commission ("FERC") regarding the suitability of the Columbia River for vessel traffic associated with a proposed LNG facility and pipeline. *Columbia Riverkeeper v. U.S. Coast Guard,* 12-73385, 2014 WL 3824247 (9th Cir. Aug. 5, 2014).

The ultimate issue for the court was whether the Coast Guard's letter of recommendation amounted to an agency order or action that issued, conditioned, or denied any permit, license, concurrence, or approval, subjecting it to judicial review under 15 U.S.C. § 717r(d)(1). The court began its analysis by discussing the commercialization, transportation, and storage of LNG, as well as the historical development of the legal framework for siting LNG terminal facilities.

Significantly, the court noted that between 1978 and 1986, the Coast Guard asserted authority over siting decisions affecting the safety and security of port areas and navigable waterways under the Ports and Waterways Safety Act, 33 U.S.C. §§ 1221-1236, the Magnuson Act of 1950, 50 U.S.C. § 191, Executive Order No. 10173. 15 Fed. Reg. 7005 (Oct. 18, 1950), and pursuant to its memorandum of understanding with a Department of Transportation ("DOT") subagency (the Office of Pipeline Safety Operation of the Materials Transportation Bureau) regarding the division of regulatory responsibility over LNG terminals. Armed with the perceived backing of the legislative and executive branches and the DOT, the Coast Guard commenced a rulemaking proceeding and proposed regulations that would require any person siting an LNG facility to obtain a "use permit" from the Coast Guard, which, of course, gave the Coast Guard enormous power with respect to the siting of LNG facilities.

The Coast Guard's reign would be short lived, however, after congressional action suggested that the Coast Guard's view of its regulatory authority was too broad, at which point (1988) the Coast Guard proposed revised regulations replacing its "use permit" requirement with a requirement that a project proponent merely secure a letter of recommendation from the Coast Guard. After a series of self-imposed demotions by the Coast Guard, Congress finally addressed the role of the Coast Guard in the LNG siting process with the enactment of § 813 of the Coast Guard Authorization Act of 2010, which required "the Secretary of the department in which the Coast Guard is operating" to "make a recommendation, after considering recommendations made by the States, to the Federal Energy Regulatory Commission as to whether the waterway to a proposed waterside liquefied natural gas facility is suitable or unsuitable for the marine traffic associated with such facility." According to the court, "this language confirmed Congress's intent to limit the Coast Guard's role in licensing LNG facilities to issuing letters of recommendation," which "has no legal effect" and amounts to nothing more than "expert advice" that "FERC will use to inform its decision of whether to approve the proposed facility."

Accordingly, the court held that because the letter of recommendation from the Coast Guard is not a "permit, license, concurrence, or approval," it is not subject to judicial review. In *dicta*, however, the court noted that any Coast Guard recommendation adopted by FERC in its final order, or any failure to adopt such a

recommendation, would be subject to judicial review under 15 U.S.C. § 717r(b), along with any orders regarding vessel traffic issued by the Coast Guard pursuant to its own independent authority.